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No. 80-1640
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION
and
THE UNITED STATES OF AMERICA, *Petitioners,*
v.
STEPHEN SHOLLY, *et al., Respondents.*
METROPOLITAN EDISON COMPANY, *et al., Petitioners,*
v.
PEOPLE AGAINST NUCLEAR ENERGY, *et al., Respondents.*

On Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rules 36 and 42 of the Rules of this Court, the Edison Electric Institute ("EEI") respectfully moves this Court for leave to file the brief *amicus curiae* annexed hereto.[1]

INTEREST OF *AMICUS CURIAE*

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and 77.1 percent

[1] While the other parties have consented to the filing of this brief *amicus curiae,* respondents Stephen Sholly, *et al.,* have not consented to EEI's participation at this stage of the proceeding. The letters providing written consent have been filed with the Clerk of this Court.

of the nation's electricity users. EEI's members include 87 companies having an interest in nuclear power plants for which construction permits or operating licenses have been issued by the Nuclear Regulatory Commission ("NRC") or for which applications for construction permits are pending.[2] In 1980 nuclear power plants produced 11 percent of the domestic electricity generated from all fuel sources by generating 251,122 million net kilowatt hours of electricity.[3] In 1979, the latest year for which figures are available, EEI member companies produced 83.7 percent, or 213,132 million net kilowatt hours, of the total nuclear power generated.[4]

As of December 31, 1979, 40,917,550 customers in 34 states were within the service areas of the EEI member utilities having operating nuclear plants and received direct benefits from the electricity they produced.[5] Customers in other areas and states received indirect benefits from these plants under regional interconnection agreements which, through regional transmission line grid systems, provide for the sale and purchase of electricity among participating utilities.

All 87 of the EEI members having an interest in operating or proposed nuclear power plants are impacted by and have an identifiable interest in the efficient and timely operation of the NRC licensing procedures. The decision by the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals")

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[2] U.S. Nuclear Regulatory Commission, *Owners of Nuclear Power Plants,* NUREG-0327, Rev. 2 (December 1979).

[3] U.S. Department of Energy, Energy Information Administration, *Monthly Energy Review* 70 (March 1981).

[4] U.S. Nuclear Regulatory Commission, *Operating Units Status Report,* NUREG-0020, Vol. 4, No. 1 (January 1980).

[5] Edison Electric Institute, *Catalogue of Investor-Owned Electric Utility Companies Operating in the United States,* 20th Ed. (1981).

therefore involves matters of vital concern to EEI and its members. Because the interest of private electric utilities nationwide and of the millions of customers they serve is not represented by any party to this action, EEI seeks this Court's permission to represent this interest through the attached brief.

The holding below would impose substantial new administrative burdens upon the NRC by requiring the NRC to hold hearings prior to acting on requests for amendments to operating licenses which the NRC has determined involve no significant hazards consideration. The NRC's compliance with these requirements would increase the burdens on the licensees involved in obtaining license amendments which involve no significant hazards consideration. More significantly, nuclear power plants might have to shut down or a scheduled shutdown might be prolonged pending completion of the hearing mandated by the Court of Appeals' decision even though such a hearing will provide little offsetting benefit to public health and safety. In addition, in order to hold the required hearings the NRC would have to divert limited administrative and staff resources from other proceedings involving more significant issues. This would in turn delay those proceedings and increase, without commensurate public benefit, the time and expense of obtaining construction permits, operating licenses and significant amendments to operating licenses and subject consumers of electricity across the nation to potential billions of dollars of additional costs resulting from additional delays.

As a national association, EEI is in a position to reflect a broader spectrum of interest and impact than the parties herein. The attached brief *amicus curiae* sets forth detailed factual information regarding the administration of the NRC licensing process to provide a

broader perspective for this case and to demonstrate that the Court of Appeals' decision improperly imposes substantial and unjustified procedural requirements upon the NRC.

CONCLUSION

For the reasons set forth above, and in the attached brief, EEI urges this Court to grant its Motion for Leave to File the attached brief as *amicus curiae.*

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF EDISON ELECTRIC INSTITUTE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	6
A. The Court Of Appeals' Decision Imposes Procedures Which Will Delay Substantially The NRC's Administrative Process Without Commensurate Justification	6
B. The Court Of Appeals Misinterpreted The Requirements Of Section 189(a) And The Intent Of Congress	16
CONCLUSION	24

TABLE OF AUTHORITIES

CASES: PAGE

Chapman v. *Houston Welfare Rights Organization*, _____ U.S. _____, 99 S.Ct. 1905 (1979) 20

Costle v. *Pacific Legal Foundation*, _____ U.S. _____, 100 S.Ct. 1095 (1980) 21

Equal Employment Opportunity Commission v. *Associated Dry Goods Corp.*, _____ U.S. _____, 101 S.Ct. 817 (1981) 5, 23

Federal Power Commission v. *Texaco Inc.*, 377 U.S. 33 (1964) 21

General Electric Company (Vallecitos Boiling Water Reactor) 1 A.E.C. 541 (1960) 4, 17, 18, 20

General Electric Company (Vallecitos Boiling Water Reactor) Docket No. 50-18 (Memorandum Opinion and Order of August 18, 1960) 17

In Re Alaska Pipeline Rate Cases, 436 U.S. 631, (1978) 4, 21

Power Reactor Development Co. v. *Electricians*, 367 U.S. 396 (1961) 5, 23

Sholly v. *Nuclear Regulatory Commission*, _____ F.2d _____ (D.C. Cir. 1980) ..... *passim.*

Sholly v. *Nuclear Regulatory Commission*, Statement on Denial of Rehearing En Banc (D.C. Cir. March 4, 1981) 14

Udall v. *Tallman*, 380 U.S. 1 (1965) 23

United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 21

Vermont Yankee Nuclear Power Corporation v. *Natural Resources Defense Council*, 435 U.S. 519 (1978) 6, 11, 24

Weinberger v. *Hynson, Westcott & Dunning*, 412 U.S. 609 (1973) 21

Zenith Radio Corp. v. *United States*, 437 U.S. 443 (1978) 23

Table of Authorities Continued

STATUTES: PAGE

Atomic Energy Act, as amended, 42 U.S.C. §§2011 *et seq.* (1980) ..... *passim.*

§189(a), 42 U.S.C. §2239(a) (1958 ed.) 17

§189(a), 42 U.S.C. §2239(a) (1980) ..... *passim.*

§191, 42 U.S.C. §2241 11

Energy Reorganization Act of 1974, 42 U.S.C. §5841 (1980) 16

Atomic Energy Act Amendment, Pub. L. 87-615, 76 Stat. 409 (1962) 16, 19

REGULATIONS:

10 C.F.R. §50.58(b) 8, 22

10 C.F.R. §50.59(a)(1)(c) 8

10 C.F.R. §50.59(e)(2) 18, 20

10 C.F.R. §2761(a) 11, 12

FEDERAL REGISTER:

26 Fed. Reg. 3930 (April 8, 1961) 18

27 Fed. Reg. 5491 (June 9, 1962) 4, 18, 19, 20

27 Fed. Reg. 10706 (November 2, 1962) 22

27 Fed. Reg. 12184 (December 8, 1962) 5, 23

45 Fed. Reg. 20491 (March 28, 1980) 8, 9, 10

45 Fed. Reg. 76602 (November 19, 1980) 10

MISCELLANEOUS:

Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., *Improving the AEC Regulatory Process*, Vol. I (Comm. Print 1961) 18, 19

S. Rep. No. 1677, 87th Cong., 2d Sess. (1962) 5, 19, 20

Table of Authorities Continued

MISCELLANEOUS: PAGE

H.R. Rep. No. 1966, 87th Cong., 2d Sess. (1962) 19

Energy and Water Development Appropriations for 1982: Hearings before the Subcomm. on Energy and Water Development of the House Comm. on Appropriations, 97th Cong., 1st Sess. (1981) 12, 13, 14, 15

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Department of Energy, Energy Information Administration, *Nuclear Power Regulation* (May 1980) 12, 13

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BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of petitioners, the United States Nuclear Regulatory Commission ("NRC") and the United States of America ("Government Petitioners") and the Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company ("Utility Petitioners"), in this case. Petitioners and EEI urge this Court to reverse a holding of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") that the NRC must hold a prior hearing on any nuclear power plant operating license amendment upon the request of an interested party even though the amendment has been determined by NRC to involve no significant hazards consideration. Utility Pet. for Certiorari, App.C.

INTEREST OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute is the national association of investor-owned electric utility companies in the United States. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and 77.1 percent of the nation's electricity users. EEI's member companies include 87 companies having an interest in nuclear power plants for which construction permits or operating licenses have been issued by the NRC or for which applications for construction permits are pending. As discussed in the foregoing Motion for Leave to File, the decision of the Court of Appeals concerns matters of vital importance to EEI and its members regarding the efficient and practical administration of NRC's regulation of the construction and operation of nuclear power plants.

SUMMARY OF ARGUMENT

1. The Atomic Energy Act imposes extensive administrative responsibilities upon the NRC to require the safe construction and operation of nuclear power plants. Before the NRC can approve construction of a nuclear power plant it must conduct an adjudicatory hearing which thoroughly investigates all necessary considerations, including health and safety issues, and must separately analyze the environmental impacts of the proposed plant. The NRC must conduct an additional hearing prior to approval of an operating license for a nuclear power plant, if requested. Thus, by the time an operating license is issued, the NRC will have thoroughly considered all relevant health and safety considerations raised by interested parties.

An operating license is a complex document which sets forth many detailed terms, conditions and specifica-

tions which frequently require modification. The NRC expects to complete action on 2,500 license amendments in fiscal 1981. Nuclear Regulatory Commission, *1980 Annual Report* at 5. Upon request, the NRC will hold hearings prior to approval of significant amendments to operating licenses.

Before the decision of the Court of Appeals, the NRC approved without a prior hearing license amendments which it determined involved no significant hazards consideration, provided that notice of approval was published in the *Federal Register.* The public was permitted to request a hearing subsequent to such approval. In making the decision which amendments qualified for such treatment the NRC was guided by several criteria developed during years of consistent administrative practice.

The average time necessary to obtain a construction permit or operating license is over three years. The record developed during initial hearings addresses numerous complex technical issues and is extremely large. NRC's Atomic Safety and Licensing Board Panel, which hears and resolves the issues raised at these hearings, is understaffed and is straining its resources to consider the 42 proceedings the NRC anticipates will be heard this year. It will be unable to handle properly a significant number of new cases.

The NRC has on the average approved approximately 400 license amendments with no significant hazards consideration during each of the past four years. If hearings are held as a result of the decision below for only a small proportion of these amendments, the entire NRC hearing process could be disrupted and delays as long as nine months for each such license amendment could occur. This could force or

prolong many plant shutdowns. The additional staff responsibilities could also delay hearings which consider significant issues regarding construction permits, operating licenses and significant license amendments. The shutdown of nuclear power plants would require the expenditure of hundreds of thousands of dollars per day per plant for replacement power and the incremental cost of such power would be borne eventually by consumers throughout the country.

The opinion below thus threatens to disrupt substantially the NRC's ability to carry out important statutory responsibilities and to increase the cost of power throughout the country with little commensurate benefit to public health and safety.

2. The Court of Appeals adopted an admittedly "paradoxical" construction of Section 189(a) of the Atomic Energy Act, as amended. This contravenes the fundamental rule that anamolous or absurd statutory construction is to be avoided. *In Re Alaska Pipeline Rate Cases,* 436 U.S. 631, 643 (1978).

Any potential question regarding the meaning of Section 189(a) is resolved by its legislative history and the Commission's longstanding interpretation. The relevant language of Section 189(a) had been adopted in 1962 shortly after the Commission implemented, first by adjudication and then by rulemaking, a procedure which permitted the staff to identify and approve insignificant license amendments without prior notice or hearing. *General Electric Co., (Vallecitos Boiling Water Reactor)* 1 A.E.C. 541 (1960); 27 *Fed. Reg.* 5491 (June 9, 1962). The Joint Committee Report regarding the 1962 amendments demonstrates congressional awareness of the Commission's regulation expediting the approval of insignificant amendments, with no express or implied

rejection of this approach. S. Rep. No. 1677, 87th Cong., 2d Sess. 8 (1962). The Report also emphasizes the goal of expediting the licensing process. *Id.* Accordingly, it is reasonable to conclude that Congress intended to affirm the Commission's practice of screening out insignificant cases from those eligible for a prior hearing. The legislative history certainly does not show that Congress expressly intended a "paradoxical" statutory scheme that would be either ineffective or favor those few with preferential access to the Commission.

Moreover, within a few months after the passage of these amendments the Commission adopted regulations which reaffirmed its prior procedure for approval of insignificant license amendments. 27 *Fed. Reg.* 12184 (December 8, 1962). The procedures established in these regulations had been in effect for almost 20 years prior to the decision below. Such contemporaneous and longstanding interpretation deserves considerable deference from this Court. *Power Reactor Development Co.* v. *Electricians,* 367 U.S. 396, 408 (1961); *Equal Employment Opportunity Commission* v. *Associated Dry Goods Corp.,* _____ U.S. _____, 101 S.Ct. 817, 823 n.17 (1981).

Since the Court of Appeals' interpretation of Section 189(a) is erroneous, and since that Court may not impose procedural requirements upon the Commission in excess of the *minima* required by statute, its decision must be reversed.

ARGUMENT

A. THE COURT OF APPEALS' DECISION IMPOSES PROCEDURES WHICH WILL DELAY SUBSTANTIALLY THE NRC's ADMINISTRATIVE PROCESS WITHOUT COMMENSURATE JUSTIFICATION.

In order to assist this Court in its review of the decision of the Court of Appeals, it is helpful to reiterate the procedures the NRC currently applies in regulating nuclear power plant construction and operation. These procedures were succinctly described by this Court in its decision in *Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council,* 435 U.S. 519, 526-527 (1978):

> Under the Atomic Energy Act of 1954 . . . as amended . . . the Atomic Energy Commission[2] was given broad regulatory authority over the development of nuclear energy. Under the terms of the Act, a utility seeking to construct and operate a nuclear power plant must obtain a separate permit or license at both the construction and the operation stage of the project. . . . In order to obtain the construction permit, the utility must file a preliminary safety analysis report, an environmental report, and certain information regarding the antitrust implications of the proposed project. . . . This application then undergoes exhaustive review by the Commission's staff and by the Advisory Committee on Reactor Safeguards (ACRS), a group of distinguished experts in the field of atomic energy. Both groups submit to the Commission their own evaluations, which then become part of the record of the utility's application. . . .[3] The Commission staff also undertakes the review required by the National Environmental Policy Act of 1969 (NEPA) . . . and prepares a draft environmental impact statement, which, after being circulated for comment . . . is revised and becomes

> a final environmental impact statement. . . . Thereupon a three-member Atomic Safety and Licensing Board conducts a public adjudicatory hearing . . . and reaches a decision which can be appealed to the Atomic Safety and Licensing Appeal Board, and currently, in the Commission's discretion, to the Commission itself. . . . The final agency decision may be appealed to the courts of appeals. . . . The same sort of process occurs when the utility applies for a license to operate the plant . . . except that a hearing need only be held in contested cases and may be limited to the matters in controversy.[5] (citations and footnote omitted)

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[2] The licensing and regulatory functions of the Atomic Energy Commission (AEC) were transferred to the Nuclear Regulatory Commission (NRC) by the Energy Reorganization Act of 1974. . . . Hereinafter both the AEC and NRC will be referred to as the Commission.

[3] ACRS is required to review each construction permit application for the purpose of informing the Commission of the "hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards."

[5] When a license application is contested, the Licensing Board must find reasonable assurance that the plant can be operated without undue risk and will not be inimical to the common defense and security or to the health and safety of the public. . . . The Licensing Board's decision is subject to review similar to that afforded the Board's decision with respect to a construction permit.

Thus, by the time an operating license is issued, the NRC will have held at least one adjudicatory hearing and may have held a second hearing addressing public health and safety issues relevant to constructing and operating a particular nuclear power plant.

The operating license is a complex document containing detailed terms, conditions and technical specifications which can run to hundreds of pages in a

typical license. Utility Pet. for Certiorari, App. F at 62a, Boyd Aff. para. 4. Because of their technical detail and scope, operating licenses and technical specifications frequently require modification. Any change to an operating license including technical specifications, no matter how minor, requires an amendment to the operating license. 10 C.F.R. §50.59(a)(1)(c).

Under Section 189(a) of the Act, 42 U.S.C. §2239(a), license amendments which involve significant new hazards consideration may be granted without a hearing following thirty days notice in the *Federal Register.*[1] If a hearing is requested, however, it must be held prior to approval of such amendments. *Id.* Prior to the decision of the Court of Appeals below, the NRC had interpreted Section 189(a) to provide that a license amendment which it determined involved no significant hazards consideration could be approved without a prior hearing (10 C.F.R. §50.58(b)) and simply published notice of approval in the *Federal Register.* The NRC had stated that it retains administrative discretion to provide a hearing before acting on such amendments. 45 *Fed. Reg.* 20491, 20492 (March 28, 1980). Members of the public who requested a hearing would have received one after approval of the amendment. Government Pet. for Certiorari at 16.

The NRC is currently proposing to amend its regulations to specify criteria to be used to determine whether a license amendment involves no significant hazards consideration. 45 *Fed. Reg.* 20491. This proposal indicates that in the past the NRC staff was guided by the following examples of amendments that

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[1] Section 189(a) is set forth in page 2 of the Petition for a Writ of Certiorari of the Utility Petitioners.

were not likely to involve significant hazards consideration (*id.* at 20492):

(i) A purely administrative change to technical specifications; for example, a change to the Definitions Sections, correction of an error, or a change in nomenclature.

(ii) A change that constitutes an additional limitation, restriction, or control not presently included in the technical specifications; for example a more stringent surveillance requirement.

(iii) For a nuclear power reactor, a change resulting from a nuclear reactor core reloading if no fuel assemblies significantly different from those found previously acceptable to the NRC for a previous core at the facility in question are involved. This assumes that no significant changes are made to the acceptance criteria for the technical specifications, the analytical methods used to demonstrate conformance with the technical specifications and regulations are not significantly changed, and such methods previously have been found acceptable by the NRC.

(iv) A relief granted upon demonstration of acceptable operation from an operating restriction that was imposed because acceptable operation was not yet demonstrated.

(v) A relief granted upon satisfactory completion of construction from an operating restriction that was imposed because the facility construction was not yet completed satisfactorily.

(vi) A change which either increases the probability or consequences of a previously analyzed accident or reduces a safety margin but for which the results of the change are within regulation acceptance criteria; for example resulting from the application of a small refinement of a previously used calculational model or design method.

(vii) A change to make a license conform to changes in the regulations.

(viii) An extension of the date, in a construction permit, for the completion of construction.

Under these examples, operating licenses were routinely amended whenever a nuclear power plant changed its fuel supply to accommodate minor technical differences in fuel characteristics and to enable a plant to conform to new regulations, such as those the NRC recently promulgated imposing additional fire safety measures (45 *Fed. Reg.* 76602 (November 19, 1980)). Other examples of no significant hazards consideration amendments are identified in our Brief *Amicus Curiae* In Support of A Petition for a Writ of Certiorari. EEI Brief *Amicus Curiae* Re Pet. for Certiorari at 6.

The NRC Notice of Proposed Rulemaking also identifies the following examples as license amendments the staff has considered likely to involve significant hazards consideration (45 *Fed. Reg.* 20492):

(i) A significant relaxation of the criteria used to estaolish safety limits.

(ii) A significant relaxation of the bases for limiting safety system settings or limiting conditions for operation.

(iii) A significant relaxation in limiting conditions for operation not accompanied by compensatory changes, conditions, or actions that maintain a commensurate level of safety.

(iv) Renewal of an operating license.

(v) For a nuclear reactor, an increase in authorized maximum core power level not previously publicly noticed.

(vi) A change to technical specifications involving a significant unreviewed safety question.

NRC has regularly provided notice and an opportunity for a public hearing prior to approval of these and similar amendments.

The procedures for granting construction permits, operating licenses and amendments to operating licenses impose substantial administrative responsibilities upon the NRC. As this Court noted in *Vermont Yankee,* each adjudicatory hearing is conducted by a three-member board of the Atomic Safety and Licensing Board Panel ("ASLBP"). 42 U.S.C. §2241. As of September 30, 1980, the ASLBP consisted of 52 individuals, only 13 of whom are permanent members. Nuclear Regulatory Commission, *1980 Annual Report* at 234. These members include 17 lawyers, 17 environmental scientists, 10 engineers, 6 physicists, 1 economist and 1 chemist. *Id.* According to the Commission, a board generally consists of a lawyer-chairman, a nuclear engineer or reactor physicist and an environmental scientist. *Id.* A hearing before a board is generally divided into two separate phases, one to consider health, safety, common defense and security issues and the other to consider en-

vironmental factors. 10 C.F.R. §2761a. Separate decisions may be issued for each phase. *Id.* In addition, antitrust issues are heard and decided by a separate board.

As of December 31, 1980, there were 68 nuclear plants licensed to operate, 82 plants with construction permits, 2 plants licensed for low power operations and 11 plants under review for construction permits. Nuclear Regulatory Commission, *1980 Annual Report* at 5. Construction permit hearings must be held for the 11 plants under review for construction permits and licensing hearings would be held, if requested, prior to issuance of operating licenses for these plants and the additional 84 plants with construction permits or low power licenses. License amendments will be filed on a frequent basis for all plants in operation. During fiscal 1980 approximately 1,900 amendments to operating licenses were reviewed and processed. Nuclear Regulatory Commission, *1980 Annual Report* at 5. NRC expects to complete 2,500 such actions in fiscal 1981. *Id.*

According to the Chief Administrative Judge of the Atomic Safety Licensing Board Panel, as of February 25, 1981, the ASLBP reported 62 active proceedings on its docket of which 42 could go to hearing within a year. *Energy and Water Development Appropriations for 1982*: Hearings before the Subcomm. on Energy and Water Development of the House Comm. on Appropriations, 97th Cong., 1st Sess. 883 (1981) (Memorandum to Commissioners of the NRC from B. Paul Cotter, Jr., Chief Administrative Judge, ASLBP (February 25, 1981)) (hereafter *Appropriations Hearings*). The Department of Energy estimates that it takes eleven years from initial planning until commercial operation of a nuclear power plant. Department of Energy, Energy Information Administration, *Nuclear Power Regulation* at 6 (May 1980). The complexity of the licensing process is a major

factor in this long lead time. The average time between applying for a construction permit and the initial decision by the ASLBP board is in excess of three years. *Id.* The time necessary for granting an operating license takes another three years or more. *Id.* The length of this process is caused by several factors including the presence of many parties, the difficulty of scheduling hearings to accommodate ASLBP members and interested parties, and the complexity of the issues involved. One recent case, involving Pilgrim Nuclear Power Station, Unit 2, required 66 days of hearings during which 12,000 pages of testimony, often involving very complex issues, and 128 exhibits, several hundred pages long, were obtained. *Appropriations Hearings* at 886. The briefs and proposed findings of the parties totalled 800 more pages. *Id.* The board was required to review and reach a decision on 56 issues and contentions raised during this process. *Id.* at 887. It held 12 conferences over 20 days to discuss these issues and required substantial additional time to study, summarize and index the record and write an opinion. *Id.* at 888-889. Conferences and drafting of an opinion are often delayed because board members are hearing other cases while a decision in one case is being prepared. *Id.* at 889. The Chief Administrative Judge concluded that the ASLBP is presently understaffed (*id.* at 886) and does not have adequate resources to handle properly any significant number of new cases (*id.* at 893).

Since staff resources are already strained and contribute to delays in the scheduling and resolution of hearings, the addition of a significant number of hearings on no significant hazards consideration amendments would cause substantial additional delays. The extent to which the Court of Appeals' decision will

stimulate such hearings is, of course, still speculative. Nevertheless, the potential for additional hearings is obvious. In the past four years the NRC has approved more than 1600 operating license amendments that it determined raised no significant hazards consideration. Government Pet. for Certiorari at 15. As the statement of four judges of the Court of Appeals objecting to denial of rehearing *en banc* points out (Utility Pet. for Certiorari, App. A at 13a), under the decision of the Court of Appeals below, "almost any expression of interest" in the licensing and operation of a nuclear power plant by a member of the public constitutes a "request" for a hearing and "the NRC will rarely be able confidently to dispense with a hearing on a licensing amendment." Consequently, where continuing interest exists, the NRC may feel required to schedule hearings even though no formal request has been made. At any rate, a simple request from an interested party would necessitate a hearing before such an amendment is approved.

By one estimate the expected delay in processing a no significant hazards consideration operating license amendment attributable to a *Sholly* hearing would be at least nine months. Utility Pet. for Certiorari at 15. Depending on the nature of the amendment, such delay on an amendment determined to involve no significant hazards consideration could force an operating plant to shut down, prolong the scheduled shutdown of a plant or force it to operate at reduced power for months. The NRC has stated to Congress that "[o]ver the past few months some 20 of the nation's 72 nuclear power plants would either have had to shut down or operate at reduced power if they had not been accorded the authority sought in license amendment requests that involved no significant hazards considerations." *Appropriations Hearings* at 1110 (Response to Questions

Submitted to NRC). The additional staff responsibilities for hearings on such amendments could also delay consideration of construction permits, operating licenses and significant amendments as well. The NRC has predicted that the decision of the Court of Appeals raises "the prospect of a substantial curtailment of nuclear power plant operations for reasons which, in the Commission's view, are unrelated to the safety of the nuclear power plants." *Id.*

While absolute quantification of the impact of the Court of Appeals' decision on delays in the NRC licensing process is not feasible at this time, there should be little doubt that the financial costs upon electric utilities and their customers will be very large. The Department of Energy ("DOE") recently stated that the incremental cost of replacing nuclear power generation lost by reasons of licensing delays varies anywhere from $100,000 to $750,000 per day. U.S. Department of Energy, Office of Nuclear Reactor Programs, *Update, Nuclear Power Program Information and Data* 60 (January/February 1981). This variation exists because companies which can obtain substitute electricity generated from expensive oil generally experience higher replacement costs than those firms which rely upon coal as their replacement fuel. Based upon recent operating experience, DOE concluded that the average financial penalty of shutting down a 1000 megawatt nuclear plant is $500,000 per day. *Id.* It concluded "[t]his is a significant sum for the consumer, particularly when the nuclear unit in question represents a large portion of the utility's generating capacity and all or most of the incremental cost is passed along to the consumer in a fuel or energy adjustment charge. The magnitude of the loss constitutes a potent argument for not delaying the startup of a nuclear unit once it is ready to operate safely and reliably." *Id.*

Any delays resulting from the Court of Appeals' decision would be in addition to those already being experienced for other reasons. For example, a DOE study of NRC licensing delays and resultant costs for 12 nuclear units owned by only a few of EEI's members estimates that even after recent NRC actions to expedite the licensing process are taken into account, there will be 51 months of delay in licensing of those units with a total direct cost of over $1 billion. Department of Energy, Division of Power Supply and Reliability, *Estimates of The Costs of Delaying Operating Licenses for Nuclear Plants* 1 (May 15, 1981). If, as a consequence of the Court of Appeals' decision, prior hearings are required for license amendments involving no significant hazards consideration, the aggregate potential delays and resultant costs for all nuclear plants owned by EEI members and for the customers they serve would be greatly increased.

B. THE COURT OF APPEALS MISINTERPRETED THE REQUIREMENTS OF SECTION 189(a) AND THE INTENT OF CONGRESS.

The decision of the Court of Appeals in this case overturned a longstanding interpretation by the Atomic Energy Commission ("the Commission")[2] of Section 189(a) of the Atomic Energy Act, as amended in 1962, Pub. L. 87-615, 76 Stat. 409 (1962), in order to implement an admittedly "paradoxical" interpretation of that provision. Utility Pet. for Certiorari, App. C at 35a n.20. Any question regarding the meaning of this provision is resolved by the legislative history of the 1962

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[2] The Atomic Energy Commission was predecessor to the Nuclear Regulatory Commission, which now has the responsibility of regulating nuclear facilities. 42 U.S.C. §5841.

amendments and related Commission actions which demonstrate that no basis exists for the interpretation adopted by the Court of Appeals.

Prior to 1960 the Commission construed Section 189(a) of the Atomic Energy Act to require hearings before approval of construction permits, operating licenses and amendments to construction permits and operating licenses. 42 U.S.C. §2239(a) (1958 ed.). By 1960 the hearing requirement had led to such delays in the administration of the amendment process that the Commission "recognize[d] the need for [an] expeditious change [*i.e.*, amendment] procedure consistent with its statutory responsibility with respect to public health and safety." Memorandum Opinion and Order of August 18, 1960, *General Electric Co., (Vallecitos Boiling Water Reactor)* Docket No. 50-18. Therefore, in the *Vallecitos* proceeding the Commission authorized the staff to approve a license amendment without a hearing if it "can make a finding that the proposed test or experiment presents no significant new hazards consideration." Memorandum Opinion and Order of November 2, 1960, *General Electric Co., (Vallecitos Boiling Water Reactor)* Docket No. 50-18, 1 A.E.C. 541 (1960).[3]

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[3] The license amendment itself read (1 A.E.C. 543):

"If the Director, Division of Licensing and Regulation determines that the proposed change, test or experiment does not present significant hazards considerations not described or implicit in the application, he may authorize the change, test or experiment upon finding that there is reasonable assurance that the health and safety of the public will not be endangered. A copy of the authorization must be filed in the record of the proceeding."

result of the fourth sentence of § 189 this would mean that affected persons would, theoretically, not necessarily have prior notice of the authorization of the changes permitted under the 50.59 provisions, while the right to a requested hearing would remain unchanged. In practice however it was clear that the *Vallecitos* approach, codified in 50.59, provided both notice and opportunity for hearing. The best evidence of the NRC's practice under the *Vallecitos* decision are actions taken with respect to license amendments in the *Vallecitos* proceeding itself subsequent to the November 18, 1960 decision later codified as 50.59. For example, a September 1, 1961 license Amendment No. 17 to the Vallecitos license DPR-1 stated that,

> prior public notice of proposed issuance of this amendment is not necessary in the public interest since [it] would not present any substantial change in the hazards to the health and safety of the public . . . .
>
> In accordance with the Commission's rules of practice (10 CFR Part 2) the Commission will direct the holding of a formal hearing on the matter of issuance of the license amendment upon receipt of a request therefor from the licensee or an intervenor within 30 days after the issuance of the amendment. 26 Fed. Reg. 8469.

This administrative practice makes clear that the NRC accorded a hearing upon request after *Vallecitos* on the kinds of issues that presented no significant hazards consideration. That Congress did not "incorporate by reference" § 50.59 in its statutory scheme did not therefore mean that Congress disapproved the Commission's practices — the straw man that petitioners would set up. See U.S. Brief 34 note 27. Congress simply achieved a similar

result in a different manner. Once sentence three did away altogether with mandatory hearings past the construction permit stage, 50.59 no longer had the same pertinence to NRC proceedings that it had before the 1962 amendments and the portions relevant to this proceeding were eventually repealed.

Finally, the notion that "the court of appeals' interpretation of the legislative history . . . fails to ascribe any independent purpose or effect to the fourth sentence" of § 189 is simply absurd. See U.S. Brief 33. The Court of Appeals gave to the fourth sentence precisely the effect its words and Congress intended, i.e. to permit the NRC to waive notice and publication of amendments found to involve no significant hazards consideration. If Congress had intended to permit the NRC to deny a requested hearing as well as waive notice and publication it could easily have found the words to do so.

3. The NRC's Own Administrative Practice Does Not Support Its Denial of a Requested Hearing Prior to Taking an Irreversible Act Pursuant to a License Amendment Found By the NRC to Involve "No Significant Hazards Consideration."

Petitioners raise the issue that the "court of appeals erroneously failed to defer to the Commission's longstanding interpretation of Section 189(a)." U.S. Brief 39. However the administrative practice offered in support of this proposition simply will not bear the weight assigned to it. Petitioners rely again principally upon the *Vallecitos* decision and its codification in 50.59 which as shown above both addressed the problem of mandatory, unrequested hearings and did not at all suggest that the NRC had authority to deny requested hearings. Met Ed Brief

27. At the time of this administrative practice the only problem the NRC had encountered concerning its single contested proceeding was the NRC's own failure to provide adequate notice and hearing which, as Intervenors noted, subjected the agency to considerable attack in Congress. Met Ed Brief 13.

Aside from these two over-used props to petitioners' case, both of which actually predated the enactment of sentence four and accordingly could be of no use in discovering administrative practice under that statute, petitioners offer very little that can be considered even relevant to the interpretation of sentence four.

Intevenors cite one lonely example of pure *dicta* from an Atomic Safety and Licensing Board decision which supports the petitioners' interpretation in this case. Met Ed Brief 29-30. But this decision is simply not the practice of the Commission itself which might be deferred to by a court. Atomic Safety and Licensing Board members are selected from outside the agency and do not include members of the Commission. Cf. 10 CFR 1.11 & 2.721. They do not form a permanent administrative organ creating a body of precedent out of a coherent fund of experience, but rather are selected from a panel to sit as *ad hoc* boards constituted for particular licensing hearings. The boards are not involved in administering the statute but rather take evidence and issue decisions on technical matters. One statement, which was in fact *dicta,* from one of these part time *ad hoc* boards in 1974 is not the kind of administrative practice that might justify the NRC's unprecedented denial of a requested hearing in this case.

From the Commission itself petitioners can only offer the bare statement that "Section 189 does permit immediate effectiveness" of amendments found to involve

"no significant hazards consideration." Met Ed Brief 29. Of course this statement says no more than that prior notice may be waived when issuing an amendment pursuant to the fourth sentence of § 189. Intervenor goes on to claim that "the Commission has consistently applied its interpretation of the Act thousands of times . . . to make license amendments effective immediately without notice or opportunity for a prior hearing." Ibid. The sense in which this statement is partially true lends no support to petitioners' attempt to overturn the decision of the Court of Appeals. There is no dispute that the NRC has authority to make "license amendments effective immediately without notice." Similarly the proposition that a prior hearing may also be omitted can be made literally true if "prior" means only prior to the authorization that may be issued without notice and does not refer to the case where a hearing may have been requested. Taken in any other sense this assertion is simply untrue. Petitioners have been unable to provide any single instance before Three Mile Island where the Commission denied a hearing that had been duly requested or where request for a hearing on an irreversible action did not suspend the effectiveness of the amendment. This would be the only kind of administrative practice relevant to this case, and it simply does not exist.

Because the petitioners offer, as examples of administrative practice supportive of their attempt to overturn the Court of Appeals' decision, matters that are wholly irrelevant to the issues at stake in this case it is important, finally, to set forth very clearly just what are the areas of difference between petitioners and respondents.

Respondents clearly do not contend that where no hearing has been requested prior to the authorization of a "no significant hazards consideration" license amendment the NRC must hold a hearing prior to the authorization. But

this nevertheless apparently forms the straw man at which much of petitioners' argument is misdirected. Respondents simply contend, first, that in every case where an affected party duly requests a hearing on a license amendment a hearing cannot be denied on the grounds of a "no significant hazards consideration" finding. Numerous references to the right to some hearing in the petitioners' briefs suggests that the petitioners do not disagree with this proposition. See U.S. Brief pp. 21, 35 notes 28 ("opportunity to intervene does not necessarily require a hearing prior to initial action by the Commission") and 29 (§ 189 fourth sentence "does not necessarily require that a hearing be held prior to action by the Commission") Met Ed Brief 16 line 4, 17 line 13, 21 lines 5-6, 25 note 21 lines 3-5. Both briefs point out that the NRC's practice is that it "remains willing to entertain requests for a hearing filed after" it issues a license amendment. U.S. Brief 40 and note 33; Met Ed Brief 29. In fact the NRC followed its practice of offering some hearing in this very case.The problem in this case is that the offer of hearing was totally meaningless because it involved actions that were irreversible and the NRC made the novel ruling that a request for a hearing would not stay the effectiveness of the amendment. Pet. 66a. There is nothing in any legislative history even suggested by petitioners or any administrative practice of any kind prior to 1980 which would authorize the NRC to issue such a ruling under any circumstances, much less where the action authorized is irreversible.

Respondents herein have recognized from the beginning that where a "no significant hazards consideration" finding is made the basis for waiving notice, and no prior request has been made for a hearing, it will not be necesary under § 189 for the NRC to hold a hearing prior to "initial action approving the amendment" by the NRC. Respondents have insisted only that a hearing on an ir-

reversible action be held on request prior to the final issuance of the amendment (after any stay) and prior to the licensee's taking any irreversible action pursuant to the amendment. Therefore it appears that the "Argument" of petitioners stated at pp. iii & 15 of the United States' Brief is in no way inconsistent with the respondents' position consistently held in the Court of Appeals and before this Court and can be easily reconciled with the Court of Appeals' holding on the facts of this case. The hearing required to be held upon request by § 189 in the case of a "no significant hazards consideration" finding may be held "after initial action approving the amendment" provided it is held prior to final issuance and effectuation of the amendment. In the case presently before this Court the NRC contemplated a hearing only after the full and irreversible effectuation of the admendment by release of radioactive materials into the environment. Such a hearing would have been nothing other than meaningless.

Petitioners attempt to explain away the absurdity of holding a hearing on an action irreversibly taken, as the NRC proposed to do in this case, with the not quite relevant observation that the "vast majority of operating license amendments are reversible." Met Ed Brief 34. While it may very well be true that "[a]mendments determined to entail no significant hazards considerations are not generally irreversible, thereby making meaningful the opportunity to seek an after-the-fact hearing and judicial review," U.S. Brief 40 note 34, it is just as clear that for those albeit few cases where the action authorized by an amendment will be irreversible a hearing after effectuation of the amendment will be meaningless. This case is not one of the "vast majority" but rather involves, as conceded by petitioners (Met Ed Brief 34), an action that was irreversible. Accordingly the interesting question of whether or not a hearing on an amendment authorizing an action that is

not irreversible may be held after effectuation of the amendment is not presently before the Court on the facts of this case. The only question is whether a hearing granted after effectuation of an admittedly irreversible action is a meaningful hearing, assuming – as it appears – that petitioners concede some hearing to be required by § 189. As the Court of Appeals simply held, "§ 189(a) required a hearing upon request on the Venting Order before it went into effect; a hearing after the venting had been completed would not have satisfied the statute's requirement." 651 F.2d 791 note 28. See also *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972)

4. This Court's Upholding of the Plain Meaning of § 189 So As To Accord Requested Hearings on "No Significant Hazards Consideration" Amendments Involving Irreversible Action Will Not Introduce The Overwhelming Administrative Burdens Imagined By Petitioners

Petitioners attempt to fashion a public policy argument that if § 189 is interpreted as the Court of Appeals did interpret it below to require a hearing when requested on a "no significant hazards consideration" amendment, there will as a result occur such a flood of hearing requests as to "threaten the viability of the existing system of regulation." U.S. Brief 41. With all respect, this argument is patent nonsense. Petitioners mention no requests for hearings on "no significant hazards consideration amendments" since the November 19, 1980 decision in this case. Petitioners fail to cite one instance other than this case where intervenors have ever requested a hearing on a "no significant hazards consideration" amendment, except for the *Consumers Power Co.* case where the Atomic Safety and Licensing Board found that the hazards considerations could be significant and granted a hearing, 7 AEC 297,

298 (1974). Met Ed Brief 29-30. The Court of Appeals ruling in this case has in fact been the law of the District of Columbia Circuit since the *Brooks* decision in 1973 without stirring a flood of hearing requests. Since petitioners seemingly concede that some hearing is required, just not a *prior* hearing, the grant of a meaningfully timely hearing will not require more resources but simply better planning. Finally, this case only deals with amendments involving irreversible action. Petitioners themselves concede that such amendments are relatively rare. This concession considerably deflates their assertions about the vast consequences of the decision in this case. Petitioners' argument about the dire consequences of the Court of Appeals decision simply does not hold up against actual experience or petitioners' own statements about the rarity of irreversible amendments.

Not only do the circumstances of this case – a request for a hearing on a "no significant hazards consideration" amendment which is irreversible – seldom arise, but numerous techniques exist for expediting the NRC proceedings which are in no way compromised by the Court of Appeals' decision. In any situation where the "public health, safety or interest so requires," the NRC is permitted by regulation to make a license modification effective immediately. See 10 CFR § 2.204. The NRC enforces a rigorous standing requirement for intervenors. 10 CFR § 2.714.

Hearing examiners have authority to dispose of issues on the pleadings where there is no genuine issue as to any material fact, 10 CFR § 2.749 and may otherwise expedite proceedings, e.g. 10 CFR §§ 2.757, 2.761.

The most telling reason why the fears proffered by the NRC may be substantially discounted was well stated by

then Circuit Judge Burger in the context of standing before the FCC. The following sage observation of Chief Justice Burger is equally applicable to the petitioners' "parade of fantasized horrors" in this case:

> The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome. Moreover, the listening public seeking intervention in a license renewal proceeding cannot attract lawyers to represent their cause by the prospect of lucrative contingent fees, as can be done, for example, in rate cases. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966)

Petitioners' "man bites dog" report that such intervenors are going to "threaten the viability of the existing system of regulation of nuclear power production, power production itself, or both," U.S. Brief 41, strains credulity.

5. The Important Interests of Due Process and Fundamental Fairness Require That § 189 Be Strictly and Faithfully Construed to Preserve the Public's Right to a Hearing Before Suffering the Irreversible Effects of Radiation, In the Absence of Clear and Unmistakable Evidence of Congressional Intent To Deny That Right.

The public has a profound interest in NRC licensing actions. In the course of deliberation on the Atomic Energy Act, Senator Humphrey stated:

> I think it is fair to say that no single development in the nation is more public in nature than the atomic development, for it has been paid for by all the taxpayers. 100 Cong. Rec. 10730 (1954).

Because of the continuing symbiotic relationship between government and the nuclear industry (see findings of fact in *Oklahoma* v. *Bernstein,* 5 Media L. Rep. 2313 (1980)) government has more direct responsibility for injuries suffered by the public in the context of nuclear regulation than would be the case in other regulatory contexts.

Because of the peculiar nature of radiation, prior regulation to prevent releases of radiation is the chief remedy available to those subjected to its hazards. The NRC has been given vast discretion to balance risks and benefits in this area, and the procedural rights granted the public constitute the chief means by which Congress has structured the discretion it has delegated to the NRC. Although the procedural rights at stake in this case have been accorded by statute, they are of a kind traditionally considered fundamental and have been accorded a high degree of protection by this Court.

i) The hearing right denied by the NRC was essential to elemental fairness and due process for those affected by the radiation releases.

The Fifth Amendment of the United States Constitution prohibits the Federal government from depriving any person of life, liberty or property without due process of law. The intentional release of radioactive materials into the earth's atmosphere, whether from the containment building of the partially melted-down Three Mile Island reactor or from any operating power reactor, adversely affects human life, burdening the public with debilitating disease and afflicting the genetic heritage of humanity with irreversible mutations and chromosomal aberrations. The assault of radiation on the human cell is a submicroscopic event, its consequences, though serious, are remote in time and attributable to diverse possible etiologies. Accordingly, the precise causal relationship between known quantities of radioactive materials dispersed into the environment and any particular human pathology is virtually unprovable, though epidemiological, biostatistical, and public health studies are showing that the generalized effects of low level radiation are seriously underestimated by the radiological theories of the NRC.

Though the injury inflicted upon life, liberty and property interests by releases of radioactive materials into the petitioners' environment may not be easily identified to particular individuals, there is no uncertainty that life in human cells will be damaged by this radiation,[2] the liberty

[2]"[I]t is generally believed that any exposure to radiation, however small, has adverse genetic effects and those effects are cumulative." Green, Safety Determination in Nuclear Power Licensing: A Critical View," 43 Notre Dame Lawyer 633, 645 (1968).

to be free of disease may well be infringed, and nearby property values may decline as animals die and suffer injury. Meanwhile, those who evacuated their homes to avoid possible injuries are deprived of their liberty of movement and peace of mind. As the Supreme Court ruled in *Duke Power* in light of the uncertainties about its health and genetic effects, the emission of radiation itself is a cognizable present injury to these interests. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978). The nature of the interests involved here, especially protection from physical assault by radiation, are profound. There are few Due Process cases that involve tort-like interferences with life and liberty interests in the physical integrity of the person because,

> prior hearings might well be dispensed with in many circumstances in which the State's conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff . . . . Monaghan, "Of 'Liberty' and 'Property,'" 62 Cornell L.R. 405, 431 (1977).

However, the nature of low level radiation injuries, the long latency period and problems of proving causation all but preclude tort recovery outside the workplace, except in such an exceptional factual circumstance as was present in *Silkwood* v. *Kerr-McGee Corp.*, 585 F.Supp. 566 (W.D. Okla. 1979), virtually the sole tort recovery for radiation injury (autopsy conducted shortly after plutonium facility worker's substantial off-site contamination, which was discovered by monitors at workplace).

For infliction of physical injury by radiation, the only effective way to accord a potential radiation victim due

process is to provide access to a hearing before the injury is inflicted. In § 189 Congress has struck a delicate balance between due process and administrative efficiency that has survived unchanged since 1962 through the most active period of reactor licensing of the 1960's and 1970's. The basic procedural rights accorded by Congress cannot be eroded by administrative interpretation without raising issues of constitutional import. This Court has stated:

> The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm.* v. *McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965).

Mathews v. *Eldridge,* 424 U.S. 319, 333 (1976).

In *Greene* v. *McElroy,* 360 U.S. 474, 507-08 (1959) the Court held:

> Where administrative action has raised serious constitutional problems, the Court has assumed that Congress . . . intended to afford those affected by the action the traditional safeguards of due process. (citations omitted) These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, *even in areas where it is possible that the Constitution presents no inhibition.* (emphasis added)

While injuries from non-natural low level radiation may be a novel twentieth century phenomenon, the procedural rights at stake in these cases are as ancient as the traditions of a free people. "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States,* 318 U.S. 332, 347, (1943) (Frankfurter, J.). In a government of laws the Nuclear Regulatory Commission must also be made subject to the fundamental and minimal procedural safeguards accorded by Congress to protect our traditional liberties. Not to do this much in an area frought with political controversy is to countenance and encourage the divisiveness, alienation and stress that happens

> . . . when a substantial number of people come to believe that major decisions have been made without their consent. If the social fabric is to survive, the politics of manipulation and delegation simply must be replaced by a politics of informed consent. Wright, "Beyond Discretionary Justice," 81 Yale L.J. 575, 586 (1972)

The fallout of psychological stress and alienation which resulted from the NRC's handling of the situation underlying this case is part of the record. In hearings on the cleanup, Senator Simpson, Chairman of the Senate Nuclear Regulation Subcommittee, noted, after hearing "residents of the local population around Three Mile Island," that it was reported the NRC "approach was driving them batty." J.A. 71. Senator Simpson sensed "a community which is already anxious as a result of the accident and highly skeptical of the two organizations directly involved in the cleanup; that is, the NRC and the utility. Given this situation, it seems to me prudent if not essential for the NRC to lay out in detail for full public review the standards it expects the utility to meet and the means it will

use to ensure the compliance." J.A. 72. The need for the NRC to provide a formal means of participation in decision making about the TMI-2 cleanup was made clear by two psycholoIgists. Dr. Bruce Dohrenwend, Head, Social Psychiatry Research Unit, Columbia University pointed out to the NRC prior to the venting the "local citizens needs to be informed and to participate in the decisions on atmospheric decontamination. He emphasized the relationship between information and participation and the level of psychological stress within the population." J.A. 90. Dr. Colman informed the NRC, after a sham "public meeting" where the public had no apparent means for influencing decision making but was rather designed to "sell" the public a decision already made:

> As a Psychologist I am getting scared. Those Meetings are rowdy . . . . I think unless some mechanism can be developed so the people in that area have a realistic understanding that they are gaining control over the situation there by having a clear effect on the Commission about its decision, that anger level is going to keep on going. Wherever it goes, I don't want to speculate, but it is not healthy, it is not good.

These behavioral scientists are expressing in the language of their own disciplines what is perhaps the fundamental constitutive principle of our democratic polity. As a leading Constitutional law scholar has expressed it in discussing the due process right to a prior hearing,

> rights to interchange express the elementary idea that to be a *person* rather than a *thing* is at least to be *consulted* about what is to be done with one. L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) 503.

ii) The public has virtually no practical recourse for protection against injurious releases of radiation upon them other than a prior NRC hearing.

The Atomic Energy Act, as amended, has placed vast powers in the hands of the five person Nuclear Regulatory Commission, an independent agency whose members are appointed to five year terms by the President with the advice and consent of the Senate, 42 U.S.C. 5841(b) and (c). The Atomic Energy Act grants the NRC broad rule-making and adjudicatory powers under "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives", *Siegel* v. *AEC,* 400 F.2d 778, 783 (D.C. Cir. 1970)

The power granted the NRC under the Atomic Energy Act in the area of protection against radiation hazards wholly preempts the police powers of state and local governments, 42 U.S.C. 2021(k); *Northern States Power Co.* v. *Minnesota,* 447 F.2d 1143 (8th Cir. 1971) *aff'd mem.* 405 U.S. 1035 (1972). Therefore, the public must turn to the Federal government, and, within the Federal government, to the NRC as virtually its sole source of regulatory protection against radiation hazards. Cf. *Train* v. *Colorado PIRG,* 426 U.S. 1, (1976); 42 U.S.C. 6903 (27) (1976); with 40 CFR 190.10 and 42 U.S.C. 7602(g) (Supp II, 1978).

The NRC is empowered by the "Price-Anderson Act", 42 U.S.C. 2210(e) (1976) to confer a limitation of liability on its licensees for any damages in excess of $560 million, a small fraction of the damage that could result from a nuclear accident. See *Duke Power* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59, (1978). For

the more insidious and less dramatic forms of radiation injuries caused by low level radiation, problems of proof, e.g. *Mahoney* v. *United States,* 220 F.Supp. 823 (E.D. Tenn.) *aff'd* 339 F.2d 605 (6th Cir., 1964), and statutes of limitations make any hope of receiving compensation for injuries by damage suits at law highly speculative. The public is accordingly not only reliant entirely upon the NRC for its regulatory protection against radiation hazards, but it is also largely dependent upon prior regulation of hazards, as opposed to *post hoc* legal remedies for damages, as a form of protection.

Notwithstanding such a scheme which combines in a single agency vast responsibility for the welfare of the public with a unique degree of untrammeled discretion, it is nevertheless true that the remedies which the public has been given in order to keep the NRC responsible have been narrow and few. Unlike statutes such as the Clean Air Act or the Safe Drinking Water Act which permit citizens' suits, see *Susquehanna Valley Alliance* v. *Three Mile Island,* 619 F.2d 231, 242 note 12 (3rd Cir. 1980), the Atomic Energy Act does not create any general public right for enforcement of environmental standards against users of radioactive material, id. 237-39. Licensees of the NRC are entirely shielded by the Agency from any direct citizens' actions in the courts under the Atomic Energy Act. Preemption prevents the state from creating any other rights enforceable in state courts. *Pacific Legal Foundation* v. *State Energy Resources Cons. & Dev. Com.,* 472 F.Supp. 191 (S.D. Cal. 1971). To protect themselves from radiation hazards created by users of radioactive materials, the public must rely upon the NRC licensing and enforcement process. It is only in the narrow framework of the NRC's administrative proceedings that the public is granted a forum within which it may attempt

to protect its interest in health and safety. Within this context the public must conform to the rules and regulations set by the Nuclear Regulatory Commission, and may appeal the final findings and rulings of the Commission only to a Court of Appeals where those findings, rulings and interpretations are accorded favorable presumptions of accuracy, reasonability, and respect, and the scope of review and opportunity for fact-finding is narrow. See e.g. *Nader* v. *NRC,* 513 F.2d 1045, 1055-56 (D.C. Cir. 1975). The rights accorded the public by Congress in its broad delegation of power to the NRC are exceedingly narrow,encompassing only the minimal due process rights of notice, public adjudicatory hearing and participation contained in § 189. Short of electing a sympathetic president who might gradually replace the NRC Commissioners or electing a sympathetic Congress which might change the whole statutory scheme for nuclear regulation, the only remedy and protection which might be pursued by citizens, such as the petitioners, residents in the vicinity of TMI-2, who find themselves victim to the radiation hazards created by an NRC licensee, is exercise of these narrow due process rights accorded by § 189.

The authority under which the NRC exercises its discretion to determine radiation hazards and to permit degradation of the environment as a cost of producing energy, is essentially similar to the legislative provisions which Justice Rehnquist would find to

> violate the doctrine against uncanalized delegations of legislative power

in *Industrial Union Department* v. *American Petroleum Institute,* 448 U.S. 607, 672, 675 (1980).

Where standards are as loose as those provided by the Atomic Energy Act it is even more essential that all of the procedural safeguards required by Congress be strictly enforced in agency decisionmaking. *See* K. DAVIS, I ADMINISTRATIVE LAW TREATISE, Section 3.15(b) (1978) pp. 209-11. In the present case the NRC is attempting to expand its discretion so as to weaken the most fundamental of due process safeguards which were provided by Congress as a guide to agency decision making in an area of inherent uncertainty. In lieu of providing firm standards to guide the substantive decisionmaking of the NRC, Congress at least structured agency procedure so as to assure that the NRC would take into account all available information by according the public the procedural rights of notice and hearing and participation. In light of the information presented in formal adjudicatory hearings Congress expected the NRC to develop its own precedents, standards and rules. However, in this case the NRC took its very first decision in the uncharted area of a reactor accident cleanup without according those procedural rights Congress erected to assure that decisions would be well-informed and based on all available information. While those rights cannot be restored, they may be vindicated by affirming the declaratory judgment entered by the Court of Appeals below.

CONCLUSION

There is no support in the plain meaning of § 189 of the Atomic Energy Act, in its legislative history, in administrative practice under the provision, in case precedent, or in reason for the NRC's contention that it can deny, on the basis of a "no significant hazards consideration" finding, the right of an affected person to have a duly requested hearing prior to final issuance and effectuation of a license amendment.

The judgment of the Circuit Court of Appeals for the District of Columbia, below, should be affirmed.

Respectfully submitted,

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